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ABSTRACT

In the article on due process in special education, the author elaborates on the due process requirements which the states have incorporated into their special education systems, discusses the due process requirements in the Education of All Handicapped Children Act (P.L. 94-142), relates these requirements to what the states have already done, and reflects upon some of the issues involved in designing a due process system which satisfies federal requirements and is educationally sound. It is concluded that no due process system will work unless the individuals who design and operate it are committed to the basic concept of the desirability of involving the parent and child in the decision-making process. (SBH)

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Due Process in Special Education: Legal Perspectives, The State of the States, P.L. 94-142 and Systems Design*

Lawrence Kotin*

Introduction

This article is a continuation of the discussion in a previous article ("Due Process in Special Education: Legal Perspectives", L. Kotin, 1976) which defined the concept of due process, described the history of its application to special education, provided an impressionistic overview of the due process provisions contained in state statutes and regulations and concluded with some reflections on the future of due process in special education. The purpose of this article is to elaborate further on the due process requirements which the states have incorporated into their special education systems, to discuss the due process requirements in the "Education of All Handicapped Children Act" (P.L. 94-142), relating these requirements to what the states have already done, and to reflect upon some of the issues involved

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in designing a due process system which satisfies federal requirements and is educationally sound.

I. The Response of the States to Due Process Requirements In Special Education

A. Introduction

As indicated in the previous article mentioned above, due process has been applied to special education primarily as the result of litigation and subsequent Congressional action which incorporated the requirements established by litigation into federal statutory requirements which are prerequisites to the receipt by the states of federal funds for special education. This combination of litigation and congressional action has produced due process requirements which are in the traditional legal mode, i.e. which emphasize the formal, adversarial procedures characteristic of courts and state administrative agencies. These traditional due process requirements, however, have been supplemented in many states by traditional educational requirements for informal involvement of the parent and, less frequently, the child in the special education process.

The most characteristic state due process system, therefore, is one which emphasizes formal adversarial procedures but provides for a degree of informal discussion and consultation between the parent and school officials. To fully describe this legal and educational hybrid, the following discussion will analyze and compare the formal and informal due process requirements in the various states.

B. Methodology

For purposes of analysis, we have divided the special education decision-making process into two principal stages: 1) referral, evaluation and placement; and 2) appeal. Within each stage, we have included a number of categories and subcategories designed to describe, as fully as possible, the components of due process at each stage. The referral, evaluation and placement stage has been divided into four major categories of parent involvement: "notice", "consultation", "consent" and "other areas".

The notice category includes the information contained in notices to the parent. Notice is considered a form of parent involvement in the sense that the parent is provided with some awareness of the nature of the process.

The consent category is a very specific one which describes those parts of the process where parental consent is required. The consent required is a direct form of parent involvement since it necessitates direct parent participation. Like the consent requirement, the various consultation requirements constitute a direct form of parent involvement, since the consultation requirement requires a meeting between the parent and school officials.

In addition to parent involvement through notice, consultation and consent requirements, there are a number of other types of parent involvement, less subject to generalization, such as the right of parents to have their child evaluated independently of the school evaluation or the right of the parents to review school records.

The appeal stage has been divided into three different categories: initial appeal, subsequent appeal and judicial review.

These categories are designed to reflect the chronological sequence of events once the parent and school system are in disagreement about some aspect of the special education process, such as whether a referral, evaluation or placement should be carried out.

For both the referral, evaluation and placement stage and the appeal stage, subcategories have been developed based upon the information received from the states in response to requests for documents which describe their due process systems. An effort has been made to include enough subcategories so that each state's due process system could be fully described. The response from the states was virtually complete with only three states not responding (Mississippi, New Hampshire and New Mexico). The following analysis of the provisions in the states will begin first with some general impressions and continue with more specific ones.

C. General Impressions

1. The referral, evaluation and placement stage

Most of the states have specific due process requirements defined at the state level. Three states[1] have established a general due process requirement at the state level but appear to leave the detailed definition of that requirement to local school systems. Several states[2] have minimal provisions at the referral, evaluation and placement stage with no indication of any delegation of authority to the local level. Thus, approximately forty states have specific due process requirements defined at the state level.

Most states provide for formal notice to the parent at some stage of the special education decision-making process. In approximately half the states this occurs at a point prior to the commencement of an evaluation or to the development of a decision regarding educational placement. In the remainder, the notice is provided only after the evaluation has been completed and an educational placement decision has been made. This approximate division of states, however, must be qualified by the fact that in a number of the states which provide the later notice, there are requirements for parent consent or consultation at an earlier stage in the process. Thus, in comparing two states with notice requirements at different stages, a later notice does not necessarily mean later parent involvement in the process.

Approximately half of the states have consent requirements which must be met prior to the commencement of an evaluation or a part of an evaluation. All states require parent consent to the placement decision. This placement consent requirement is usually phrased in terms of acceptance or rejection of the placement decision or the evaluation procedures which were the basis for that decision, or in terms of the right to appeal, or some combination of these.

Most of the states provide for informal consultation between the parent and school officials, frequently in addition to notice and consent requirements. The purpose of these consultation requirements varies from state to state and includes explaining the procedures described in the notice, gaining parent consent to an evaluation or trying to secure a reversal of a previous

denial of such consent. The consultation provisions, therefore, are frequently related to the notice and consent requirements.

In most states, there is no indication that parents are provided with a specific notice of consent or consultation requirements. The nature of the consent requirement, however, is such that it must be communicated if consent is either to be given or withheld. Presumably, therefore, notice of the right to consent is communicated in some manner. Failure or inadequacy of communication in this area, however, may be one reason for the frequent complaint that parents fail to respond to requests for consent to one or more aspects of the special education process.

Only a few states[3] directly involve the parent in making the educational placement decision. Such involvement is distinguished here from involvement in consenting to allow others to make that decision.

In summary, most states provide for a formal notice to the parent at some point in the special education decision-making process, although such notice is given as frequently after as it is before an educational placement decision is made. Aside from involvement through a formal notice, direct involvement of the parent in the process most commonly takes the form of the giving or withholding of consent, consultation with school officials to discuss the need for consent and consultation of a more general nature to discuss the overall process or some aspect of it such as the referral or evaluation. Parent involvement in making the educational placement decision, in contrast to consenting to have

others make the decision or to securing an understanding of the process is seldom provided for by state due process systems.

2. The appeal stage

The initial appeal in most states concerns parent rejection of an educational placement decision. In approximately ten states[4], the initial appeal might concern the parent's refusal of consent for an evaluation or failure to respond to the school's request for such consent. In addition, there are several other bases for appeal such as the right of the school district to appeal the parent's rejection of an educational placement decision[5]; the right of the parent to appeal the denial of a request for a private school placement[6]; the right of a parent to appeal a school district's refusal to have a conference with the parent[7] or to conduct an evaluation[8]; the right of the child, the person referring the child or another person involved in the child's case to appeal the parent's decision to refuse to consent to the evaluation or the placement decision[9]; and the right of the parent to appeal a case of non-compliance by the local school district with the decision of the hearing officer[10].

The most typical appeals system is a two tier system where the initial appeal is conducted by local officials or their appointees, with a subsequent appeal to the state level. In this system, the formal due process hearing occurs during the initial appeal with the subsequent appeal being a review of the record of the due process hearing, with no new evidence or testimony added to what was presented at that hearing.

Although these two characteristics are found in the most common appeals system, a substantial number of states have appeals systems which vary from this model. For example, several states[11] have a one tier system. In some of these states[12], the hearing is conducted by a state-appointed hearing officer while in others[13], it is conducted by local officials or a locally-appointed hearing officer.

In other states[14], the initial appeal includes a due process hearing and the subsequent appeal appears to include a new hearing at which new evidence is presented (This new hearing is frequently referred to as a de novo hearing and is to be distinguished from the common situation where a subsequent hearing officer, in reviewing the record at the previous hearing, is authorized to request additional testimony or evidence). In some of the states[15] which seem to provide for a new hearing at the second level, the degree of new evidence which will be permitted at the hearing is in the discretion of the hearing officer who apparently can use as much of the record of the initial hearing as he/she wishes, in addition to hearing new testimony and receiving new evidence (The words "seem" and "apparently" are used because it is difficult to draw a sharp line between the situation where the subsequent hearing is a new one and where the subsequent hearing combines part of the record of the earlier hearing with new testimony and evidence).

In several states[16], the initial appeal is to a state designated hearing officer (or mediator)[17], and the subsequent

appeal is to the state education agency or state commissioner of education. One state[15] presents a variation of this model by providing for a subsequent appeal to a quasi-administrative body composed half of parents of children with special needs and half of educational and clinical professionals. Another state[19] presents a further variation by having the subsequent appeal be an informal one conducted by the state education agency. In several other states[20], the initial appeal is preceded by an informal meeting or mediation session. In one state[21], such a mediation conference is held at the discretion of the parent who also has the option of proceeding directly to the local board of education.

Approximately half of the states specifically provide for judicial review of the final decision of the administrative process. In most cases where judicial review is not specified, however, it is probably provided for under the state administrative procedure act which normally specifies the right of an "aggrieved party" (e.g., a losing party) to appeal to the court from the final decision of an administrative agency.

In summary, the most typical appeal system has two tiers with the initial appeal including a due process hearing conducted by local officials or their appointees and with the subsequent appeal conducted by the state education agency. The review at the subsequent hearing is typically limited to the record of the initial hearing, with the hearing officer having the authority to hear new testimony or receive new evidence. Although these characteristics describe the appeals system in a substantial number of states, a

large number of states have some variation of those characteristics. Court appeals from the final administrative decision are either provided for or implicitly included through the state administrative procedure act.

D. Specific Impressions

1. Referral, evaluation and placement stage

a. Content of the notice

Most notices merely inform the parent about some aspect of the special education decision-making process. Very few request the parent to do anything. Among those which request the parent to to do something, the most common[22] asks the parent to give permission to evaluate. In other states, parents are requested to attend a conference to discuss the child's referral[23], to participate on a committee which is developing recommendations to change the child's educational program[24], to attend a conciliation conference[25], and to release to the school information from outside diagnosticians[26] (It should be noted that this discussion is limited to those parental rights which are specified in the notice, itself, and that it is frequently the case that such rights are provided for in regulations or other formal documents, but not specified in any notice to the parent).

Most notices do not describe in detail the proposed action or the reasons for that action. Where a notice does include a description, parts of the special education process which are most commonly described are the referral, the results of the evaluation and the proposed placement. The reasons for each of

those actions are given less frequently than a description of those actions. Several states[27] describe the referral of the child and indicate the reasons for that referral. Several others[28] do the same for the evaluation while approximately half describe and give reasons for the placement decision, itself.

Few states provide notice of the names of individuals involved at various stages of the process, such as the names of individuals conducting the evaluation. Several states[29] specify who initiated the special education process while one state[30] indicates the person responsible for carrying out the decisions made at the referral and the evaluation conferences. Two states[31] indicate who is conducting the evaluation and who will be making the placement recommendation. One state[32] indicates who was responsible for denying the parent's request that the school evaluate the child for a new placement.

Approximately half of the states specify the tests, instruments or reports on which the proposed placement is based. One state[33] describes what the tests measure and their limitations with regard to the children being tested.

Approximately half the states describe alternative placements which were considered in addition to the one decided upon and several of these[34] describe the reasons why such alternative placements were not appropriate for the child (e.g. the placement was not the "least restrictive alternative").

A few states refer to a future notice which the parents will receive, such as a notice of the results of the

evaluation[35]. One state[36] specifies that the subsequent notice will describe the results of the evaluation, will include a copy of the educational plan and will tell the parents of their right to meet with school officials to discuss the proposed placement.

Most of the states provide notice of the parent's right to obtain an independent evaluation (This notice is provided either at this stage or at a pre-hearing stage). Only a few[37], however, indicate who will pay for the costs of such a evaluation. Approximately a third of the states indicate where an independent evaluation can be obtained without cost.

A few states specify in the notice that the parents have the right to consult with school personnel concerning one or more aspects of the child's education[38]. A few states specify the parent's right to attend various meetings during the process[39].

A number of states[40] provide a statement of the parent's right to refuse to consent to the evaluation. Several of these[41] provide for a right of the school district to a hearing to try to obtain parental approval.

More than half of the states specify the parent's right to inspect and copy relevant student records. In most of the other states this right is probably provided for in laws and regulations governing pupil records.

Virtually every state specifies the right of the

parent to reject the placement decision, to appeal and to have a due process hearing. Most states describe the procedures for appealing or objecting to the school's decision and approximately eight[42] describe the appeal process beyond the due process hearing (It should be noted that most of the remainder of the states describe the later stages of the appeal process prior to the initial due process hearing).

Approximately nine states[43] indicate where indigent persons can obtain free legal counsel. Approximately half of the states indicate that the child's educational status will not be changed, without parental consent, until the due process procedures have been completed. Most of the states provide an exception where the health or safety of the child or other children would be endangered by maintaining the current placement.

A number of other infrequently encountered provisions are contained in the notice. For example, at least two states[44] provide that all communications to the parents shall be in the primary language of the home as well as in English. One state[45] requires local school districts to provide pertinent information regarding educational services and associated medical and social services. Another state[46] provides that if response to the "Parental Consent for Evaluation" form is not received within fifteen days after it is sent, a school official will contact the home to determine the reason for the lack of response and the necessity for assigning a surrogate parent. Another state[47] provides for a right to a comprehensive evaluation even if the school has only recommended

a limited evaluation. Several states[48] provide for involvement of the child in the decision-making process either through notice[49] or direct participation[50]. One state[51] provides the name, address and phone number of a contact person in the local school district to assist parents in exercising their rights. Finally, one state[52] provides notice of the parent's right to review the evaluation procedures and instruments, to be informed of how the evaluation findings will be used, to receive the proposed educational plan with a description of how it was developed and to have a review of the placement, with notice of the time the review will be conducted.

2. The appeal stage

a. Content of the Pre-hearing notice

As indicated earlier, this notice often contains a description of the appeal process and of the parent's right to an independent evaluation of the child. As was the case with prior notices, very few states[53] provide the names of specific individuals who will be involved in the appeal process.

As in the earlier notices, most states provide for the right to inspect and copy records while approximately eleven[54] refer to the right to compel the attendance of witnesses at the hearing. Most states also indicate the exact time and place of the hearing.

In addition to the notice provisions already described, there are a number of infrequently encountered ones. For

example, several states[55] provide for pre-hearing conferences to try to resolve difference of opinion, to simplify the issues, to amend pleadings, to obtain admissions of fact[56] and to discuss the proposed placement[57]. Also, several notice provisions[58] provide for the child to remain in the current placement pending the outcome of the hearing. In one state[59] the parent is provided with the right to end the process after the due process hearing by requesting that the child be placed in the regular education program (This ends the process so long as the placement is not dangerous to the child or other children).

b. The hearing

Most states provide that the adversarial hearing be conducted by an "impartial" hearing officer or panel. There is considerable variation, however, in the meaning given to the word "impartial". Several states[60] require that the hearing officer be "unbiased, disinterested and independent of the local system which made the original decision". One state[61] provides a slight variation of this by requiring simply that the hearing officer be "unbiased and disinterested". Several states[62] require that the hearing officer be "appointed" or "assigned" by or be an employee of the state education agency.

A substantial number of states require the impartial hearing officer to be appointed locally. As with hearing officers appointed at the state level, there is a great variation in these local level appointments. For example, several states[63] provide

for school board members to be hearing officers. Other states[64] allow school board members the option of appointing a hearing officer as an alternative to holding the hearings themselves. Some states[65] require that the hearing officer be a designee of the local school board. A number of states[66] require that the hearing officer be a particular employee of the local school district.

In addition, there are a number of unique provisions for hearing officers. For example, one state[67] provides for a hearing board established by the state education agency. Another state[68] provides for a local hearing review board with three members chosen from a list of ten "unbiased" persons who do not reflect the cultural, racial or ethnic background of the child. One state[69] provides for "an impartial mediator" assigned by the state education agency, and required to be unbiased, disinterested and independent of both the local school district and the state education agency.

One state[70] provides for the hearing officer to be mutually agreed upon by the local school system and the parent and, if agreement cannot be reached, appointed by the state education agency. Another state[71] has a similar provision.

There is a great variation in the amount of time which is permitted between the time of notice of or request for the hearing and the time when the hearing is held. Virtually every state has a different provision with time lapses varying from five to forty-five days[72].

Most states specify that the hearing must be "fair and impartial". Approximately half the states have a provision concerning whether the hearing is open or closed. In some[73] it

is closed unless an open hearing is requested by the parents; in others[74] it is open unless a closed hearing is requested by the parents; in yet others[75], it is closed with no parental option to have it open.

Several states[76] provide that the parent may "compel" the presence of witnesses while others[77] provide that the parent may only "request" such presence.

Most states allow some form of representation of the parents by a third party, but there is considerable variation in the kinds of representatives which are permitted. The most common provisions are those which are unrestricted, e.g., "including but not limited to counsel"[78], "a person chosen by the student or the student's parents"[79] and "any person chosen by the parents"[80]. The next most common are those which are restricted in a general way, e.g., "by legal counsel and others with special knowledge or training in the area of handicapping conditions"[80]. The least common are those which are restricted, e.g., "counsel"[81] or "an advocate"[82].

Virtually every state grants the right to present evidence and testimony. In addition, most states specify the right to confront and cross-examine adverse witnesses. Presumably, the right to confront adverse witnesses carries with it the right to compel their attendance.

Approximately half the states specify the right of deaf parents or parents whose primary language is not English to have an interpreter at the hearing. Most of these states do not specify who will pay for the interpreter but at least two states[83]

who do, indicate that payment shall be the responsibility of the local school district, while a third specifies "public" responsibility[84]. One state specifies that the interpreter will be provided at the expense of the local school district or at public expense[85].

At least thirteen states[86] require the presence of the child at the hearing. Of these states, however, eleven[87] qualify this requirement by giving the hearing examiner the authority to exclude the child if the examiner finds that the child's presence will be "harmful" to the child. Two states appear to allow the child to be present, without qualification[88].

Approximately half the states define the burden of proof. At the hearing where the placement decisions is at issue, the typical burden of proof provision requires the school district to demonstrate that the evaluation or placement or both were "appropriate"[89]. One state requires the parent to demonstrate the inappropriateness of any proposed classification or placement[90].

Several states[91] have a separate burden of proof requirement which must be met before an evaluation can be done. This requirement is applicable to situations where a parent has failed to respond to a request to evaluate or has refused permission to evaluate and the local school district wishes to go forward with the evaluation. In the situation of a failure to respond, these states require the local school district to demonstrate that efforts "reasonably likely to succeed" were made to contact the parents and that there is a "reasonable likelihood"

that the child will be found to have special needs.[92] Where the situation involves a refusal of permission to evaluate, the same states require the local school districts to demonstrate that the continuing presence of the child in the current placement is so dangerous to the health and safety of the child or so disruptive of the program that an evaluation must be undertaken as a first step to a new placement.

One other state[93] has a unique burden of proof provision which requries the school district, in the case of a parental refusal to give permission to evaluate, to demonstrate that it has "reasonable grounds to believe that the educational assessment procedures are justified". In the case of a parental failure to respond, the same state requires the local school district to demonstrate that it has repeatedly tried to contact parents, utilizing efforts reasonably calculated to succeed.

Most states have requirements concerning the availability of a record of the hearing. The variations between the states, however, are very great with regard to the form of the record and whether the parent must pay for it. As to the form, the record is required to be "verbatim"[94],"a tape recording"[95], "a tape recording or verbatim"[96], "a written transcript"[97], "written or electronic verbatim"[98], "a tape recording or record made by a court reporter"[99] and "a summary"[100]. As to payment, most states which provide for a record of the hearing do not specify whether the record is available "free" or at cost to the parent. Several states[101] provide for a free copy

to the parents, while others[102] specify that the parent must pay for a copy. One state[103] provides that a record of the hearings may be made by either party if it chooses, with the implication being that a record will not be made unless one party chooses to make it.

The standard for review which must be applied by the hearing examiner is specified in approximately half of the states. The most typical standard requires the hearing examiner to determine if the proposed placement is "appropriate"[104]. A variation of this[105] requires the examiner to determine whether: 1) the child has special needs; 2) the evaluation procedures were appropriate; 3) the "diagnostic profile" on which the placement decision was based is "substantially verified"; and 4) the proposed placement is "related to the child's educational needs". Frequently required as a part of the review, is a finding that a "more normalized placement would not serve the child's needs"[106]. One state provides that the review be based on "the best interests of the child"[107].

Approximately half the states specify what must be contained in the decision, itself. Most of these states require a statement of the facts, the conclusions and the reasons for each conclusion. Some states provide specifically for summaries of each of these components[108].

With regard to the evidence which is the basis of the decision, most states provide that the decision be based solely on evidence and testimony presented at the hearing. One state provides for the admission of other evidence, if both

parties consent[109].

The typical state provides that the decision be in writing and sent to all parties. The method of delivery of the decision varies among the states with most states requiring that it be by "certified mail" and some states requiring "registered mail"[110] or a choice of certified mail or "personal delivery"[111]. Some states require that it be in English and the primary language of the home[112]. Most states specify a time limit for sending the decision after the hearing. The time limits vary from twenty four hours[113] to thirty days[114].

Most states provide for a statement of further rights to be included with the decision. The most typical of these statements details the additional appeal options which the parent may exercise.

In addition to the various rights described above, most states include in their notices some reference to the placement of the child pending the various appeals. Since the appeals process can have a duration of a year or more in some states, this aspect of the notice is particularly important. The most typical provision concerning placement of the child pending the completion of the appeal process maintains the status quo by providing that the child shall remain in the current placement unless the continuing presence of the child in that placement endangers the health and safety of the child or of others.

A number of states have variations of this typical model. For example, one state provides that a temporary change in placement may be made upon written request by the school

superintendent and upon written notice to the parent[115]. Another state provides that if a child is not in a "free" educational program, the child shall be placed in a "free" educational program which is deemed suitable by the staff of the local school district[116].

II. The Requirements of P.L. 94-142

The previous section of this article provided a comparative overview of the various state due process systems in the area of special education. This section will examine, in detail, each of the due process requirements of P.L. 94-142 and will comment, in general terms, on whether those requirements appear to have been satisfied by most of the states. The comments will be limited to a general determination of whether there is minimum formal compliance with the requirements and will not attempt to discuss the extent to which satisfaction of the requirements exceeds that minimum or the extent to which there has been a failure of implementation. Each comment will conclude with a general opinion regarding the extent to which each requirement has been formally complied with by the states as a whole.

P.L. 94-142 enumerates a series of due process requirements which are prerequisites to the receipt by the states of federal funds under the Act. The Act (in section 615) provides that the required procedures "shall include but shall not be limited to" the procedures listed below.

1. "An opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation and educational placement of the child

and the provision of a free, appropriate public education to such child" -This requirement has been satisfied in many states and does not seem to pose a problem of formal compliance.

2. "An opportunity for the parents or guardian of a handicapped child...to obtain an independent educational evaluation of the child" - Most states provide notice of the right to an independent evaluation. Few specify who will pay for it. The Act is unclear on the issue of payment unless the "opportunity" referred to is interpreted to mean a "free opportunity". If it is so interpreted, it may pose a problem of formal compliance since most states do not seem to provide an opportunity for a "free" independent evaluation.

3. "Procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian" - An analysis of the extent to which there is compliance with this requirement was beyond the scope of this article. It is common knowledge, however, that the design of systems to recruit, train and assist parent surrogates will pose a serious problem of formal compliance and implementation since little attention has been given to this area of need.

4. "Written prior notice to the parents or guardian of

the child whenever such agency or unit (receiving funds under the Act) proposes to initiate or change, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child"- This notice requirement has been satisfied in most states with regard to the educational placement but not with regard to identification and placement. Many states, therefore, will be required to expand their notice provisions and to send notices to parents at earlier stages in the process than is now the case.

5. "Procedures designed to insure that the notice...fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant [to the due process section of the Act]" - The general notice requirement has been addressed by most states and will not pose a serious formal compliance problem. The "native language" requirement, however, has only been satisfied by a few states and will pose a problem of formal compliance if it is strictly construced and enforced. It will pose less of a problem if the "feasibility" loophole is liberally interpreted to give school systems an excuse for not meeting the requirement.

6. "An opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child" - This requirement should not pose a serious problem of formal compliance, since most states provide for a variety of formal and informal complaint processes. One problem which may arise, however, concerns the interpretation of the word "opportunity". If this is interpreted to mean a formal due process hearing, most states will have to incorporate additional hearing procedures into their present systems for providing impartial due process hearings.

In addition to the required procedures of the "due process section", the section also requires each state to provide an opportunity for "an impartial due process hearing" and for a series of appeals from the decision at such a hearing. The hearing and appeal requirements are the following:

1. "An impartial due process hearing which shall be conducted by the State educational agency, by the local educational agency or intermediate unit, as determined by state law or by the State educational agency" Most states have complied with this requirement but there has been considerable variation in the nature of such compliance. This requirement may pose problems of compliance after the"impartial due process hearing requirement" is clarified.

2. "No [due process] hearing shall be conducted by an employee of such agency or unit involved in the education or care of the child" - A number of states permit the appointment of hearing officers who are employees of the local "agency or unit involved in the education or care of the child." These states will have to modify this practice. In addition some states allow local board members to hold hearings. This raises the issue of whether an unpaid board member is an "employee" of a local agency or unit. This area requires clarification. A determination of the seriousness of the compliance problem, therefore, cannot be determined until after such clarification.

3. "If the [due process] hearing is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct

an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review" - This requirement has been satisfied by most of the states which provide for a due process hearing at the local or intermediate level and should not pose a serious problem of compliance.

4. "Any party to any [due process] hearing shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and to confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions..."-Requirements (2) and (4) are provided for by most states. Requirements (1) and (3) raise the issue of cost. Who will pay for counsel or representation or for the transcript of a hearing? With regard to payment for counsel or other representation, the states are silent, except for a few which indicate where free counsel may be obtained. A few states provide for public payment for a transcript of the due process hearing, but most are either silent or provide for payment by the requesting party.

Thus, requirements (1) and (3) raise the issue of the meaning of "right". Does this mean an entitlement at public expense or merely an "opportunity", <u>if it can be afforded by the parents</u>? Clarification of the meaning of "right" will determine whether the requirement raises serious compliance problems,

i.e., if "right" means entitlement at public expense, this requirement will have to be satisfied in most states.

A related issue is how the clause "individuals with special knowledge or training with respect to the problems of handicapped children" will be interpreted. Will lay advocates be included or excluded? If they are included, most states will have to add this to their due process provisions.

5. "A party aggrieved by the [findings of the complaint process or the due process hearing] shall have the right to bring a civil action...in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy..." - This judicial review requirement has been addressed by most states and does not pose a serious problem of formal compliance.

The final provision of the "due process section" relates to the placement of the child pending the outcome of the appeals process. It provides the following: "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed." This requirement, which, in general, provides for the preservation of the status quo until the completion of the appeal process, has been satisifed by most states. The only serious problem of compliance concerns the

placement in the public school program, of children applying for initial admission to public school. This requirement is not addressed by most states and will require additions to their due process provisions.

III. Issues Involved in Designing a Due Process System

This section of the article will highlight some of the more significant issues raised by the previous discussion of the state due process systems and of the due process requirements in P.L. 94-142. These issues will then be discussed with a view toward assisting states in designing special education due process systems which are both fair and educationally sound, i.e., produce a "desirable" educational result.

A. Parent Involvement

A threshold issue concerns the type of parent involvement which is most desirable. The states provide for parent involvement in three principal ways: through notice, consent and consultation requirements. In addition, a few states provide for direct parent involvement in making the educational placement decision. Each of these forms of parent involvement will be discussed below.

A notice "involves" the parent by providing an awareness of one or more aspects of the process. Awareness of the process is significant since it creates the opportunity for involvement. Virtually every state provides for notice to the parent at some point in the decision-making process. In addition, notice is required by P.L. 94-142. Notice,therefore, is an essential part of any special education system.

The principal issue with regard to notice is when to give it. As indicated previously, the states divide equally on this issue with approximately half providing notice at some point prior to the making of the educational placement decision and the other half providing notice at some point after that decision but prior to the actual placement. P.L. 94-142 requires a written notice prior to the initiation of a referral or evaluation. It also requires a written notice prior to a proposed placement, but not necessarily prior to the making of the decision regarding that placement. Thus, the states must decide whether to provide notice to the parents prior to or after that placement decision. In general, a notice maximizes the opportunity of the person receiving it to participate, if it is received as early as possible in the process.

A few states require parental consent to a referral or evaluation. P.L. 94-142 contains no such requirement, although it does require a form of limited parental consent to placement by allowing the parents to appeal a placement decision. This is limited consent because it is implied in the nature of the appeal process that if the parent loses and cannot afford a private placement, the child will be placed in the recommended educational program. Thus, some parents do not have an absolute veto.

In general, a consent requirement is a very limited, although potent, form of parent involvement. Use of the consent requirement raises a number of issues. For example, is it legally necessary to have parental consent, or is this an area, such as achievement testing, which is within the discretion of the school

to carry out without the consent of the parent. Is a consent requirement a desirable form of parental involvement? Suppose the parent refuses to consent, what process or action should follow? Who has the ultimate legal authority to override a parental refusal to consent? Should a refusal to consent be considered final and absolute? What response should the system make to a parental failure to respond to a request for consent? How should differences of opinion between the parent and child be resolved?

Most states provide for some form of parental involvement through informal consultation. A substantial number of these provisions, however, are geared toward securing parental consent. P.L. 94-142 contains an informal consultation requirement.

An informal consultation provides the opportunity to resolve a controversy in a friendly and non-adversarial manner. For such consultations to be effective, however, parents must be aware of them and the conference must not be coercive in nature. Also, as in the case of the notice requirement, informal consultations will probably be most effective if they occur prior to the making of the decision which is being discussed.

A few states provide for direct parent involvement in the making of the educational placement decision. This type of involvement has the advantage of enabling the parent's knowledge of the child to be applied to the decision. It also is a direct way of informing the parent about the placement decision and of giving the parent a stake in that decision. Although the effect of this kind of direct parent involvement has not been documented, it is likely that one effect would be to reduce the number of

appeals from placement decisions since the parents' concerns would be heard prior to the making of the decision and could then be reflected in that decision. P.L. 94-142 requires direct involvement of the parent or guardian in developing the educational plan.

Subject to the minimum requirements of P.L. 94-142, each state has the latitude to select from among the various forms of parent involvement discussed above. Such selection must inevitably be based upon value judgments regarding the desirability of one form or another of parent involvement and of the variations within each form.

B. The Involvement of the Child

Only a few states provide for involvement of the child during the early stages of the special education decision-making process with a slightly larger number of states providing for such involvement at the due process hearing. P.L. 94-142 requires involvement of the child in developing the educational plan, but only if such involvement is "appropriate."

Virtually every other system of due process, including juvenile and civil commitment proceedings involving minors, directly involves the juvenile or minor or adult who is the subject of the proceeding. In this sense, the special education systems which have been developed are unique in excluding from involvement the person who is the subject of the decision which is being made, i.e., the child.

One of the issues involved in excluding the child is that the child's point of view always has to be presented by a substitute, i.e., the parent or guardian. Also, persons representing the parents, such as counsel, advocates and special education professionals, must represent the child's interests as

seen by the parents. This can be particularly treacherous where the parents and child are in disagreement with each other over the placement decision.

In addition, exclusion of the child may make it impossible to act in the child's best interests since, in many cases, the child's preference will be synonomous with the child's best interests. Also, exclusion of the child may ultimately be found by the courts to violate the child's right to due process, despite the fact that the parent has been involved in the process. Recent federal court decisions and state statutes indicate a movement in the direction of recognizing interests of the child which are independent of those of the parent and which must, therefore, be presented by the child rather than the parent. This kind of division of interests has always been the case in the area of child abuse and neglect and is increasingly being recognized in areas such as abortion, treatment for drug addiction, treatment for venereal disease and civil commitment proceedings where parents are attempting to commit their child.

Each state, therefore, must consider the desirability of including the child in the special education decision-making process. Since P.L. 94-142 permits such involvement, each state may include it as part of its due process system.

C. The Impartial Due Process Hearing

Virtually every state provides for some form of "impartial due process hearing". P.L. 94-142 requires that the parents have an opportunity to present any complaints about the special education process in such a hearing. The availability of an impartial

due process hearing procedure, therefore, is a necessary part of any special education due process system.

The establishmnet of such a hearing procedure, however, raises a number of issues. Who should be the hearing examiner? How can the hearing examiner be chosen and paid so as to remove any appearance of potential conflict of interest or partiality? How can the hearing process be designed so that the bargaining power of the parent is equal to that of the school system? More specifically, should indigent parents have access to free independent evaluations, free advocates and free hearing transcripts in order to give them an opportunity equal to that of more affluent parents and in order to equalize their bargaining power with that of school systems? Although the due process hearing is an essential part of any state due process system, is it sufficient without prior informal procedures designed to focus the issues or resolve the issues without the need for an adversarial due process hearing?

D. The Mediation Approach

In addition to the various informal consultation requirements and to the more formal due process hearing, several states have provided for a mediation procedure to be available at the time of commencement of the process leading to the impartial due process hearing. This procedure is not required by P.L. 94-142. The general differences between the mediation procedure and the due process hearing are that mediation is less formal, less adversarial and less pressured than the hearing.

A number of criticisms have been made of the exclusive use of an impartial due process hearing without any prior mediation process. Among these are that the due process hearing: 1) requires a great financial and emotional cost of the participants; 2) is too abstract and does not provide the hearing officer with a complete picture of the child's needs or of the school system's ability to implement a plan; 3) tends to be overly legalistic and narrow in focus, obscuring the goal of an educational placement which is in the best interests of the child; 4) tends to exclude poor and minority parents because of lack of pre-hearing outreach and communication and because of the intimidating nature of the formal hearing. The critics of the due process hearing, while recognizing the need for it, believe that the need could be reduced and the due process hearing made more effective by the addition of a prior mediation process which focuses or resolves issues.

The advantage of a mediation process in comparison and as an adjunct to a due process hearing are considered by its advocates to be the following: 1) it is slower and the fact-finding is more complete; 2) the mediator, more easily than a hearing officer, can reduce parent anxiety and increase parent involvement; 3) the mediator can suggest new program ideas to schools, while the hearing officer is less able to do this because of the requirement of "impartiality", which, while important in the mediation process, is not as heavily stressed; 4) mediated agreements are "better for the child" because they are more

complete than hearing decisions which tend to be more "skeletal" and abstract; 5) local school systems are more likely to implement a decision reached through mediation than one forced upon them by the hearing process; 6) the issues are clearer earlier than in the hearing process; and 7) mediators are more "successful" in resolving disputes than are hearing officers, and, therefore have more job satisfaction than hearing officers.

Introduction of a mediation process into a special education due process system would involve a substantial amount of effort. Nevertheless, such effort might well be compensated for by a total process which is procedurally fair and which produces the best possible educational result.

IV. Conclusion

Each state expecting to receive federal funds under P.L. 94-142 must comply with the requirements of that Act. Those requirements include an effective system of notice to parents, an impartial due process hearing and a system of appeals beyond the due process hearing.

In addition to designing a special education system which includes due process procedures which satisfy the requirements of P.L. 94-142, each state should consider designing a due process system which is both procedurally fair and educationally sound. One problem with mandated federal requirements is that, despite their disclaimers to the contrary, they are frequently considered to be both the minimum and maximum provisions which a state should adopt. In the case of due process in special education, such an

interpretation of the federal requirements might leave the states with systems, which, while formally adequate from a compliance perspective, are inadequate in producing the desired results of the best possible placements for as many children as possible, regardless of the economic income or ethnic identity of the family.

In order to have due process systems which "work", it will be necessary to have systems which 1) provide to poor and minority families, extensive outreach and communication, free representation, free independent evaluations and free hearing transcripts and 2) which have built into them a well designed informal process which precedes the formal due process hearing. One or both of these characteristics are integral parts of most due process systems outside of special education. They also represent the severe shortcomings of those due process systems which have not accepted them.

Involvement of the child is another requirement which is essential for a successful system, since it is difficult to conceive that an important decision-making process can be fair and effective if the person about whom the decision is being made is completely excluded. Finally, no due process system will work unless the persons who design and operate it are committed to the basic concept of the desirability of involving the parent and child in the decision-making process.

Footnotes

1. Ark., Md. and Vt.
2. E.g., Colo., Me., Nev., Utah and Wyo.
3. E.g., Conn., Mass. and Mich.
4. E.G., Ala., Iowa, Ky., Minn., N.D., Ohio, Okla., S.C., S.D., and Va.
5. E.G., N.D. and Wyo.
6. E.g., Calif.
7. E.g., Ill.
8. E.g., Ha., and Va.
9. E.g., Wash.
10. E.g., Minn.
11. E.g., Colo., D.C., La., Mont., Nev., S.C., Tenn., Wisc. and Wyo.
12. D.C., Nev., Tenn. and Wisc.
13. Colo., La., Mont., S.C. and Wyo.
14. E.g., Ariz., Mich., N.C., Tex., and Va.
15. E.g., Mich.
16. E.g., Ala., Idaho, Ind., N.D., Okla., Pa., S.D. and Vt.
17. Idaho
18. Mass.
19. Idaho
20. E.g., Conn., Mo. and N.J.
21. Conn.
22. E.g., Ala., Idaho, Iowa, Ky., Ohio, Okla., S.C., S.D., Tex. and Va.
23. Ark.
24. Mich.
25. Minn.

Footnotes, cont'd.

26. Tex.

27. E.g., Ark., Calif., N.J., Tex. and Wash.

28. E.g., Calif., Minn., Ohio and Okla.

29. E.g., Ala., Iowa, Mass., Ohio, Okla., S.C., S.D., Va. and Wash.

30. Ark.

31. Minn. and Ohio

32. Va.

33. Ohio

34. E.g., Iowa, Minn., Ohio, Okla., and S.D.

35. E.G., Ark., Ga., Idaho, Iowa, Minn., Okla., S.C., S.D. and Va.

36. Mass.

37. E.g., "Public": Ala., D.C., Okla., S.C. and S.D.; "public or local school district": Iowa; "public, if at an approved facility, otherwise at private expense": Mass.; "at private expense": Minn. and Ohio.

38. E.g., "evaluation and proposed placement": Alas., Ga., and Mass.; "referral and evaluation": Ga. and Mass.; "the child's problems": Ill.; "the child's progress in the placement": Idaho; "the placement decision": Ohio and W. Va.

39. E.g.,"all proposed actions":Calif.;"development and writing of educational plan": Mass. and S.C.; "annual review conference": Idaho.

40. E.g., Ala., Ga., Idaho, Iowa, Ky., Minn., Ohio, Okla., S.C., Va. and Wash.

41. Ala., Iowa, Ky., Minn., Okla., S.C., S.D. and Va.

42. Ala., Iowa, Mass., Mich., Minn., Okla., S.C. and S.D.

43. E.g., Ala., Iowa, Ky., Mich., Okla., Pa., S.C., S.D. and W.Va.

44. E.g., Ariz. and Mass.

45. Ark.

46. Ga.

Footnotes, cont'd.

47. Mass.

48. Mass., Minn. and Mont.

49. Mont.

50. Mass. and Minn.

51. R.I.

52. S.C.

53. Iowa, N.C., Ohio, Va. and Wash.

54. E.g., Ala., D.C., Ind., Iowa, Mich., Ohio, Okla., Pa., S.C., S.D., Tenn. and W. Va.

55. E.g., Idaho, N.Y. and Ohio.

56. Wyo.

57. E.g., Alas., Del., Ill. and N.D.

58. E.g., Iowa, N.D., Ohio, Okla. and S.D.

59. Mass.

60. E.g., Ala., Ariz., Ind., Iowa, Okla., and S.D.

61. Ky.

62. E.g., Ala., Conn., Ind., Iowa, Mass., Mo., Nev., N.C., Okla., Pa., S.D. and Vt.

63. E.g., Colo., Tex., Wash.

64. E.g., Me. (with parent consent), R.I. and W. Va.

65. E.g., Alas., Ore. and S.C.

66. E.g., Mich. (supt't. of intermediate or constituent district), Mont. (county sup't.), N.Y. (chief school officer or designee), and Ohio (sup't. of schools or designee)

67. Conn.

68. Ga.

69. Idaho

70. Minn.

Footnotes, cont'd.

71. Calif.

72. E.g., 5 days (Del. and Ill.), 10 days (Ha.), 15 days (Fla. and Ohio), 20 days (Ga., Va. and Wash.), 15-30 days (Mich., Minn., Pa., Tenn.), 40 days (Idaho), 20-45 days (Ind.), 15-45 days (Ore., Tex. and W. Va.) and 30-45 days (Calif.)

73. E.g., Ala., D.C., Ga., Ind., Iowa, Kan., Ky., Minn., N.Y., N.C., (second appeal), Okla., Ore., S.C., S.D., Tenn. and W. Va.

74. E.g., Idaho, Mich. and Pa.

75. E.g., Conn. and Mass.

76. E.g., Ala., Ariz., Conn., S.C., Tenn., Wash., W. Va. and Wyo.

77. E.g., Idaho, Minn. and Ore.

78. E.g., Ala., Conn., D.C., Ga., Ind., Iowa, Me., Minn., N.J., N.Y., Ohio, Okla., Ore., Va. and W. Va.

79. Ha.

80. Calif., Ill., Mich. and Pa.

81. E.g., Alas., Colo., Fla., Kan., Mo., N.C., S.C., Tenn. and Tex.

82. E.g., Wisc.

83. Kan. and N.Y.

84. Okla.

85. Iowa

86. E.g., Ala., Idaho, Iowa, Kan., N.Y., N.C., Ohio, Okla., S.C., S.D., Tenn., Va. and W. Va.

87. Ala., Idaho, Iowa, Kan., N.Y., Ohio, Okla., S.C., S.D., Va. and W. Va.

88. N.C. and Tenn.

89. E.g., Conn., D.C., Ga., Ind., Iowa, Kan., N.D., Ohio, Okla., Ore., Pa., S.D. and W. Va.

90. N.Y.

91. Ala., Iowa, Ky. (after a conference has failed to result in permission being granted), Okla. and S.D.

Footnotes, cont'd.

92. id.

93. Minn.

94. E.g., Ala., Conn., D.C., Idaho, Okla., R.I. and S.C.

95. E.g., Alas. and Ore.

96. E.g., Iowa, Kan., Ky, and S.D.

97. E.g., Fla., Mont. and Mo.

98. E.g., Ariz. and Ohio.

99. E.g., Ill.

100. E.g., N.Y.

101. E.g., Ariz., S.C. and W. Va.

102. E.g., Mich., N.C., R.I., Tex. and Wyo.

103. Ha.

104. E.g., Ala., Conn., Okla. and S.D.

105. E.g., Del., Fla., (except for number 4), Ill. and Tenn. (with some additional standards)

106. E.g., Ala., Conn. and Okla.

107. N.C.

108. E.g., Ohio and Wisc.

109. Ha.

110. Kan., Minn., Neb., N.C., Ohio, Pa. and S.C.

111. Ha. and Wash.

112. Ariz. and N.D.

113. E.g., Kan.

114. E.g., N.C. and W. Va.

115. E.g., Mich.

116. E.g., Ind.